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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 579

THE UNITED STATES, PETITIONER

v.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE, AND W. E. ALBERT, RECEIVER OF THE IOWA-WISCONSIN BRIDGE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on July 11, 1949, by the United States Court of Claims.

OPINIONS BELOW

The opinions in the Court of Claims (R. 36–38) are reported at 84 F. Supp. 852.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1949 (R. 58). A motion for new trial was denied on November 7, 1949 (R. 58–59). Jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

In the vicinity of the respondent's bridge property, the Mississippi River, which in a state of nature was a navigable waterway of the United States, surrounds islands with its several channels, and only one of such channels is improved and maintained by the United States for commercial navigation.

The question presented is whether, upon the choice of a main channel, the navigation servitude over the entire river is continued or is relinquished over the other channels, unless such channels are separately proven to be navigable.

STATEMENT

This is an action to recover for an alleged taking resulting from damage to a toll bridge property by reason of the Government's establishment and operation of Lock and Dam No. 9 in the Mississippi River, about 205 miles below Minneapolis.

Lock and Dam No. 9 is one of a series of navigation dams constructed in the Mississippi River to create a nine-foot channel between the mouth of the Illinois River and the Twin City Dam, as directed by Congress in the Act of July 3, 1930, c. 847, 46 Stat. 918, 927 (Fdg. 11, R. 21).

About 15 miles up river from Lock and Dam No. 9, the respondent operated a toll bridge and road traversing the Mississippi River and bottom lands from Lansing, Iowa, to a point near De-

Soto, Wisconsin, a distance of about 2¾ miles (Fdg. 7, R. 19; Fdg. 11, R. 21; Map, Appendix A, R. 60).

The toll bridge and road went into operation in June 1931 (Fdg. 6, R. 19). Lock and Dam No. 9 was completed, and, on April 18, 1938, the pool of the dam was filled for the first time raising the level of the river to elevation 620, which was about 3½ feet above ordinary high-water mark at the toll bridge and road (Fdg. 11, R. 21; Fdg. 8, R. 20).

The respondent's property consisted of a high steel span across the main channel of the Mississippi and a dike roadway about 2½ miles long through the bottom lands. This roadway was intersected by five sloughs or channels. Wooden trestle bridges connected the roadway at these intersections. In addition, there were approaches from the mainland at each end of the property. (Fdg. 7, R. 19–20.)

The Court of Claims held the Government liable for damages resulting from maintenance of pool elevation 620. It granted judgment for $84,375, plus interest at 4 percent from April 18, 1938, as representing the sum necessary "to enable plaintiff to meet and overcome the servitude placed upon the property by reason of defendant's construction and operation of Lock and Dam No. 9." Included in the judgment was $35,000 representing the cost of rebuilding the wooden bridges built on trestles in the beds of

two of the five sloughs, namely Big Slough and Winneshiek Slough "with steel spans and supporting piers." (Fdg. 36, R. 35–36.)[1] These two bridges, the court found, had been damaged by reason of scouring in the beds of the sloughs around the supporting timbers or piers, coupled with the pressure of the increased quantity of ice coming down the sloughs which forced the bridges out in March 1945, seven years after the dam went into operation (Fdg. 25 and 26; R. 27). The judgment also included an additional $2,000 for rebuilding land barriers to provide protection to the bridge abutments under the conditions created by Lock and Dam No. 9 (Fdg. 36, R. 36; Fdg. 19, R. 25).

The Government took the position that the two sloughs traversed by the wooden bridges, with respect to which $35,000 in damages was allowed, were a part of the Mississippi River, a navigable waterway of the United States; it contended that since the bridges were in and over these navigable waters, any damage to them resulting from navigation improvements was not compensable. This same contention applied to the $2,000 allowed for rebuilding the land barriers since they would be as much a part of the bridges as the abutments the proposed barriers would protect. The Court of Claims, Judge Whitaker dissenting (R. 55–58),

[1] Of the remaining three sloughs, one was filled in (Fdg. 7, R. 20) and no claim was made, and nothing was allowed for the wooden bridges across the other two sloughs.

avoided the Government's contention by limiting the Mississippi River to the channel maintained by the United States for commercial navigation, and treated the channels traversed by the two wooden bridges as if they were independent watercourses. On that basis, the court found them to be nonnavigable (Fdg. 6, R. 19; Fdg. 13, R. 22–23).

REASONS FOR GRANTING THE WRIT

1. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 595–597, this Court held that the navigation servitude extended to the entire bed of the Mississippi and refused to adopt the view that the servitude was limited to the portion used for actual navigation. In the present case, the Court of Claims took a different road to arrive at the conclusion rejected by this Court in that case. It held that the navigation servitude was limited to the main channel marked, maintained and used by actual navigation. This it did by ruling that the Mississippi River consisted solely of the main channel, 1,200 feet wide (Fdg. 6, R. 19). It did not explain why it separated the main channel from the side channels of the same river. It simply dealt with the side channels, Winneshiek Slough and Big Slough, just as if they were independent watercourses entirely unrelated to the Mississippi River, and proceeded to test those channels for navigability as though they were separate waterways of the

United States. On that basis, it denied the United States its navigation servitude over those two channels, solely on the ground that the channels were not navigable in fact (Fdg. 13, R. 22–23).

In so limiting the navigation servitude, the court below announces a novel doctrine. The Mississippi River is navigable and the navigation servitude extends to the entire bed of the River. *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 597. If Winneshiek Slough and Big Slough are waters of the Mississippi, the United States is not liable for damage to the two wooden bridges in and across those sloughs, resulting from the improvement of navigation. Persons placing structures over a navigable stream must "suffer the consequences of the improvement of navigation." *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 70. See also *United States* v. *Chicago, M., St. P. & P. R. Co.,* 312 U. S. 592, 599. Cr. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 389, 399, 400; *Monongahela Bridge Co.* v. *United States,* 216 U. S. 177, 186, 193–194; *Hannibal Bridge Co.* v. *United States,* 221 U. S. 194, 199, 206–208; *Louisville Bridge Co.* v. *United States,* 242 U. S. 409, 420–421.

But the court below limits the sovereign power to regulate commerce by confining it to the particular channel of the river being maintained for

navigation at the time the damage occurred. This result is arrived at on the Court of Claims' view of the controlling legal principle—that navigability in fact of each channel is the test and the relationship among the channels irrelevant. But cf. *United States* v. *Turner,* 175 F. 2d 644, 647 (C. A. 5), certiorari denied, 338 U. S. 851 ("no distinction upon the ground of navigability between the shallows and depths of navigable waters"). The effect of the decision below is that where the Government elects to improve one of several channels of a navigable river, the channel selected for improvement becomes the navigable river, and the remaining channels are released from the paramount navigation servitude unless they are independently proven to be navigable. In other words, upon the first exercise of the servitude, the sovereign right to improve the river became restricted to the particular channel improved, and the Government automatically surrendered the superior navigation servitude theretofore existing as to all the other channels unless it could prove that each of those channels taken by itself was navigable. That is simply another way of saying that the navigation servitude exists only as to the portion of the river actually improved, and that the Government is liable for resulting damages to structures in portions of the bed of the river outside of the improved area. That concept, as

we have seen, was rejected by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595–597.[2]

In his dissenting opinion, Judge Whitaker followed the concept accepted by this Court in *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* when he stated (R. 57): "If the Government is immune from liability for damage to a structure erected in the main channel, it must necessarily follow on principle that it is immune from liability for damage to a structure erected over one of the other channels." The error of the court below becomes clear when its holding is applied to a situation where a small island (compared to the size of the river) divides the river into two channels, a deep one and a shallow one, or a wide one and a narrow one. In such a case, each channel is part of the river and the

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[2] The decisions relied upon by the Court of Claims do not, in fact, support its judgment (R. 53, note 6). For present purposes, we need briefly consider only the two decisions of this Court that are cited. In *Leovy* v. *United States*, 177 U. S. 621, the watercourse involved, Red Pass, was not a channel of a navigable river. It was an independent waterway which branched off from the Jump, which, in turn, branched off from the Mississippi. Neither Red Pass nor the Jump returned to the Mississippi, but flowed, instead, into the Gulf of Mexico.

In *Healy* v. *Joliet & Chicago Railroad Co.*, 116 U. S. 191, affirming 94 Ill. 416, no question was involved of definition of a river and the relationship between one channel and another. The only question was whether navigability in fact of a particular waterway had been decided in accord with proper principles.

requirement of an independent testing of the smaller channel for navigability is insupportable. Yet no different legal question is here presented simply because there is more than one island or because some of the islands are relatively large.

The situation here is no different in principle than that present in *South Carolina* v. *Georgia,* 93 U. S. 4. In that case, this Court, in dealing with the Government's power to improve the Savannah River at a point where it was divided into two channels by an island about six miles long and one mile wide (p. 6), stated (p. 11):

> *The two channels are not two rivers,* and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. [Emphasis supplied.]

2. The conclusion arrived at by the Court of Claims is without support in reason. The Mississippi River is one of the great navigable watercourses of the United States.[3] In the course of the hundreds of miles of its navigable length, there are numerous islands of varying size. These islands form obstructions to the flow. As the river approaches such obstructions it divides into two or three or more channels. Such a situation is present in the stretch of the river in suit, just as it is present in innumerable places in the

[3] For a history of the discovery of the Mississippi and navigation on the Mississippi, see Dictionary of American History, Vol. III, pp. 422–424, 425–426.

river above and below the place in suit. (See pp. 11–12, *infra*).

A little upstream from the Bridge Company property, the river splits into several channels which meander through the bottom lands and reunite downstream. For purposes of this petition, we need be concerned with only three channels—the main channel, maintained for commercial navigation, which the court below labeled "Mississippi River," and two secondary channels, Winneshiek Slough and Big Slough.

The course of the river and its various channels in the vicinity of the bridge property before the construction of Lock and Dam No. 9 is shown on the map incorporated as a part of the findings of the court below as Appendix A (Fdg. 13, R. 23, Appendix A, R. 60. See original made a part of the record). Even casual observation makes plain that the side channels, Winneshiek and Big Sloughs, are a part of the river. They carry a portion of the total flow. They have neither independent sources nor contributing sidestreams. They stem from the main channel of the river and return to the main channel (Fdg. 13, R. 22–23). Moreover, these side channels are not mere rivulets. They are substantial watercourses. At the time the respondents sought permission of the Secretary of War to construct the wooden bridges across the side channels, and in 1931, at the time the bridges were constructed,

Big Slough was 148 feet wide and Winneshiek Slough was 250 feet wide (Fdgs. 5, 7, R. 19, 20).

Before any improvement work was done, the United States could have selected any of the channels of the river for deepening or widening for navigation purposes. It elected to improve what is now the main channel and maintained first a 4½-foot and later a 6-foot depth in the area in suit, mainly through the use of wing dams and closing dams placed at the heads of the sloughs so as to direct sufficient of the flow into the channel to be improved to maintain the desired depth. House Doc. No. 341, 59th Cong., 2d sess. (1906), p. 8 (area in suit between Winona and Wisconsin River). In this fashion, prior to the construction of Lock and Dam No. 9, some of the water from Big Slough and Winneshiek Slough had been diverted into the channel improved for navigation (Fdgs. 13, 23, R. 22, 23, 26). The Government might have selected Winneshiek or Big Slough for development as the navigation channel, at the expense of what is now the main channel. In other words each of these channels, prior to the improvement of any of them, was a part of the navigable Mississippi and therefore subject to the navigation servitude.

In its finding relating to the portion of the river at the site of Lock and Dam No. 9, the Court of Claims itself recognized that the Mississippi River includes all of its channels, not merely the channel actually used for navigation (Fdg. 11, R.

21). At the dam site (shown near the bottom of the map, Appendix A, R. 60), the river is divided by islands into a main channel and a number of side channels which are designated on the map as sloughs. However, the court below did not define the Mississippi River at this point, as confined to the channel maintained for navigation. It found that the lock and dam "straddles the river from shore to shore" and that the structure consisted of a lock and concrete dam "all in the *main channel,* then an earthen section 9,300 feet long, extending from the west end of the concrete dam to the opposite side of the river valley." (Emphasis supplied.) In specifying the number of gates in the dam the court again found the concrete dam to be "in the main channel" (Fdg. 11, R. 21).

If the Mississippi River embraces the main channel and the side channels at the point where Lock and Dam No. 9 is located, it embraces the main channel and side channels in the vicinity of the respondent's property.[4] As explained in the dissenting opinion below "if the level of the water in the main channel is raised, then the level of the water in the other channels is necessarily

[4] Cf. Finding III of the Court of Claims set out in *Gibson v. United States*, 166 U. S. 269, which related to a point in the Ohio River where an island divided the river into two channels. The finding distinguished between the "north, or main navigable, channel of the Ohio River" and "the south channel of said Ohio River, which is not navigable."

raised, unless steps are taken to prevent the water from flowing down them at all" (R. 57).

3. This case presents a question of great general importance. The decision below results in a grave impairment of the sovereign constitutional power to regulate commerce. It establishes a new legal concept of what constitutes a navigable river, and thereby narrows the navigation servitude by confining it to the single channel marked for improvement. This case does not present an isolated or peculiar fact situation. There are hundreds, if not thousands, of instances where the great rivers of this country divide into multiple channels by reason of islands in the path of flow.[5] As a practical matter, it is difficult to conceive of an improvement affecting the water level of one channel of a navigable river which will not affect the other channels. The effect of the decision be-

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[5] For example, see maps of the various surveys of the Mississippi River made by the War Department.

1. Surveys made in 1866, 1867, 1868 and 1869, House Ex. Doc. No. 1, pt. 2, 45th Cong., 3d sess. (1878); account of surveys, vol. 4, pp. 1094–1125, list and description of maps of survey, pp. 1113–1123, Map M. 152 and Map M. 217 in the National Archives, Records of the Office of the Chief of Engineers.

2. Surveys made in 1878 and 1879, House Ex. Doc. No. 1, pt. 2, 46th Cong., 3d sess. (1880), Vol. 4, pp. 1514–1525; Map M. 245 and Map M. 221 in the National Archives, Records of the Chief of Engineers.

3. Map of the Upper Mississippi River from the mouth of the Ohio River to Minneapolis, Minnesota, National Archives, Records of the War Department, Office of the Chief of Engineers, the Mississippi River Commission R. G. 77.

low is that those channels which are not in themselves navigable in fact, would no longer be within the regulatory powers of Congress. *E. g.,* Act of March 3, 1899, c. 425, secs. 9, 10, 30 Stat. 1151, 33 U. S. C. 401, 403; General Bridge Act of August 2, 1946, c. 753, Title V, 60 Stat. 847 as amended, 33 U. S. C. 525–533. It follows that if the decision below stands, the navigation servitude will be greatly narrowed, the regulatory powers of the United States will be seriously diminished and the Government will be subjected to substantially increased costs.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General

FEBRUARY 1950.

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